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Nos. 04-1528, 04-1530 and 04-1697

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IN THE

# Supreme Court of the United States

NEIL RANDALL, *et al.*,
*Petitioners,*
v.
WILLIAM H. SORRELL, *et al.*,
*Respondents.*

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
*Petitioners,*
v.
WILLIAM H. SORRELL, *et al.*,
*Respondents.*

WILLIAM H. SORRELL, *et al.*,
*Conditional Cross-Petitioners,*
v.
NEIL RANDALL, *et al.*,
*Conditional Cross-Petition Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING PETITIONERS AND CONDITIONAL CROSS-PETITION RESPONDENTS

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## INTEREST OF THE AMICUS CURIAE

*Amicus* Republican National Committee ("RNC") is an unincorporated association that participates extensively in national, state, and local elections.[1] The RNC is subject to and complies with applicable rules imposed by the federal and state governments, including Vermont. The RNC has in the past and will in the future support candidates who are subject to the provisions of Vermont's Act 64.

## SUMMARY OF ARGUMENT

1. Act 64's presumption that political party independent expenditures primarily benefiting six or fewer candidates are coordinated with those candidates offends the First Amendment for the reasons set forth in *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604 (1996) ("*Colorado I*"). In *Colorado I*, the Court struck down a presumption that political party independent expenditures were coordinated with candidates because such a blanket presumption itself infringes speech, and independent expenditures present no prospect of corrupting the benefited candidate. Moreover, Act 64's presumption offends the Due Process Clause because it reverses the burden of persuasion in a way that punishes speech, sets forth no definitive mechanism for challenging the application of the presumption to a particular expenditure, and fails to guarantee a prompt resolution of any such challenge so that the speech can proceed.

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than amicus made a financial contribution to the preparation or submission of this brief.

2. Act 64's scheme of expenditure limitations violates the First Amendment by imposing "direct and substantial restraints on the quantity of political speech." *Buckley v. Valeo*, 424 U.S. 1, 39 (1976). The proffered justifications for Act 64 do not withstand strict scrutiny. As explained in *Buckley*, 424 U. S. at 45-46, 47-48, expenditure limits do not correlate to any anti-corruption purpose. Moreover, the asserted interest in protecting the time of incumbent politicians is neither compelling nor related to the imposition of expenditure limits, since much if not most political fundraising by such means as direct mail and the Internet is done with little personal involvement of the candidate, the expenditure limits do not ensure that officeholders will devote more time to their official responsibilities (as opposed to other campaign activities), and the expenditure limits enhance the powers of incumbency. Finally, the expenditure limits are neither narrowly tailored to advance the asserted state interests, nor are they the least restrictive means for doing so, since Vermont has not, unlike many other states, enacted legislation that prohibits fundraising while the legislature is in session. Finally, the suggestion that this Court revisit its precedents holding expenditure limitations offensive to the First Amendment fails to satisfy the threshold requirements for overruling settled precedent.

## ARGUMENT

### I. ACT 64'S PRESUMPTION OF COORDINATION VIOLATES THE FIRST AMENDMENT AND DUE PROCESS CLAUSE.

Act 64 provides that independent expenditures made by a political party "that primarily benefit[] six or fewer candidates" associated with that party are presumed to be coordinated expenditures on behalf of those candidates. VT. STAT. ANN. tit. 17, § 2809(d). Any coordinated expenditure,

in turn, is deemed to be "a contribution to the candidate on whose behalf it was made," VT. STAT. ANN. tit. 17, § 2809(a), and is subject to the applicable limit for contributions to that candidate. *See* VT. STAT. ANN. tit. 17, § 2809(a).[2] The Act defines "expenditure" broadly to encompass any spending "for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates." VT. STAT. ANN. tit. 17, § 2801(3). Thus, an "independent expenditure" under Act 64 is a very broad and vague concept.[3]

The text of Act 64 does not state whether this presumption of coordination is conclusive or rebuttable, but administrative guidance promulgated by Vermont's secretary of state suggests that the presumption is rebuttable. *See* Guide to Vermont's Campaign Finance Law 30 (November 2005) *available at* http://vermont-elections.org/elections1/2005_cf_guide_1118.htm ("When an expenditure is presumed to be a related expenditure, the presumption can be overcome by evidence that the elements of the definition in section 2809(c) were not met.").

Although Act 64 does provide that a *candidate* may bring an expedited court action to declare that expenditures made

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[2] Violations of Act 64's contribution limits through independent expenditures deemed to be coordinated expenditures appear to be civil, as opposed to criminal offenses. *See* VT. STAT. ANN. tit. 17, § 2806(b) (providing for a civil penalty of up to $10,000 for each violation of Act 64). A $10,000 civil penalty is very substantial: it is more than 3-percent of the expenditure limit for candidates for Governor; 10-percent for Lieutenant Governor; and 22-percent for certain executive branch offices. The penalty exhausts the spending limits for State Senate, county office, and State Representative.

[3] The RNC contends that the definition of "expenditure" is grossly overbroad in numerous respects, but this issue is not currently before the Court.

on behalf of an *opposing* candidate are coordinated, *see* VT. STAT. ANN. tit. 17, § 2809(e), neither the Act nor administrative guidance provides a similar judicial or administrative mechanism for a *political party* making such expenditures to bring a court action or administrative proceeding to rebut the presumption. Indeed, the enumeration of one mechanism for seeking review under 2809(e) suggests that other modes of review are prohibited. *See In re 1650 Cases of Seized Liquor*, 721 A.2d 100, 106 (Vt. 1998) (applying *expressio unius* canon of construction to Vermont statute).

### A. Independent Expenditures Are Fully Protected By the First Amendment.

This Court has twice reviewed restrictions on political party independent expenditures and both times has held them unconstitutional. In *Colorado I*, 518 U.S. at 617-18, the Court ruled that an expenditure by the Colorado Republican Party was constitutionally protected, and rejected the argument that political parties have a lesser right to make independent expenditures than other speakers: "We do not see how a Constitution that grants individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." *Id.* at 618 (principal opinion by Breyer, J.). The Court was unpersuaded by the FEC's presumption that, "as a matter of law," party expenditures are coordinated with candidates, writing "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22.

More recently, in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 213-19 (2003), the Court unanimously struck down section 213 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 94, which

required political parties to elect between making coordinated expenditures and independent expenditures. Again, the Court emphasized that political party independent expenditures are "plainly . . . entitled to First Amendment protection," and that no "meaningful purpose" was served by restricting such expenditures. *McConnell*, 540 U.S. at 217-18.

### B. Act 64's Related Expenditure Provision Will Severely Restrict or Eliminate Independent Expenditures by Political Party Committees.

Section 2809(d) was intended to and does encompass the vast majority of political party independent expenditures. Any independent expenditure criticizing a candidate would presumably benefit only that candidate's opponent, and would fall within the presumption. Any independent expenditure praising a single candidate would fall within the presumption. Indeed, it is unusual for an independent expenditure to "benefit" more than one candidate, meaning that the presumption will swallow the bulk of independent party spending.[4]

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[4] Judicial decisions addressing particular independent expenditures confirm this point. *See e.g., Colorado I*, 518 U.S. at 608 (concerning independent expenditures by a political party committee for advertisements about U.S. Senate candidate Timothy Wirth); *Federal Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 483 (1985) ("*NCPAC*") (concerning independent expenditures by political action committees in support of President Ronald Reagan); *Federal Election Comm'n v. Public Citizen*, 268 F.3d 1283, 1286 (11th Cir. 2001) (concerning independent expenditures by a non-profit organization for advertisements opposing Speaker of the House Newt Gingrich); *Federal Election Comm'n v. Furgatch*, 807 F.2d 857, 858 (9th Cir. 1987) (concerning independent expenditures by an advertiser opposing President Jimmy Carter); *Federal Election Comm'n v. Cal. Democratic Party*, No. Civ. S-03-0547 FCD DAD, 2004 U.S. Dist.

(continued...)

Moreover, section 2809(a) imputes independent expenditures by political parties to candidate committees, counting them not only as "contributions" to the beneficiary candidate, and thus subjecting them to the draconian contribution limits, but presumably also against that candidate's spending limit. This provision is patently unfair to candidates because independent expenditures – which by definition the candidate does not control or even know are coming – may deplete candidate spending allowances. Consequently, political party committees will be deterred from making any independent expenditures because their activities may preempt the favored candidate's ability to communicate directly with voters. Plainly, such deterrence was the very purpose of the provision.[5]

### C. The First Amendment Does Not Permit the Government To Presume that Speech Is Unprotected Until the Speaker Rebuts the Presumption.

Section 2809(d) creates the same type of "presumption of coordination" that this Court found improper in *Colorado I*,

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LEXIS 7269, at *3-*5 (E.D. Cal. 2004) (concerning independent expenditures by a political party committee in support of Congresswoman Lois Capps).

[5] According to the district court below, the restraint on independent expenditures in section 2809 "was designed to plug a loophole that would have allowed for circumvention of Act 64's individual contribution limits." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 490 (D. Vt. 2000). The restriction would prevent political candidates from evading campaign finance restrictions "by asking others to collect and spend money for them." *Id.* This is an argument for regulating *coordinated expenditures*, however, not independent expenditures, which involve no prior communication between the political party and the candidate's campaign.

518 U.S. at 622. As the Court explained, "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22. Under *Colorado I*, section 2809(d) must fail.

The lower court attempted to distinguish *Colorado I* on the ground that the presumption of coordination in that case was "conclusive," whereas the presumption in section 2809(d) is ostensibly rebuttable, through as yet unspecified procedures. *See Landell v. Sorrell*, 382 F.3d 91, 146 (2d Cir. 2004). This is no distinction at all; as did the presumption in *Colorado I*, section 2809(d) plainly places a severe burden on independent speech for no valid reason. The time, effort, and expense necessary to rebut the presumption is a burden on speech, especially in the fast moving context of a political campaign. The result will be little if any independent party spending. No government interest has been advanced to justify this suppression of speech.[6]

Further, the government may not simply presume speech unprotected until the putative speaker rebuts the presumption. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (the burden of proving that speech is unprotected "must rest on the censor"); *see also Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("In practical operation, therefore, this procedural device [a statutory presumption that speech is unprotected] must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free.").

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[6] In what appears to be the only reason for the presumption, Vermont State Representative Terry Bouricius, who is the sponsor of the legislation, asserted that expenditures supporting six or fewer candidates were "more likely to be part of [a] campaign." *Landell*, 118 F. Supp. 2d at 492 n.28.

The net effect of section 2809(d) is to restrict speech unless and until the party obtains a ruling, if such a ruling is even allowable, that the speech is *not* coordinated. In this manner, the presumption creates a prior restraint of speech that is impermissible under the First Amendment. *See Freedman*, 380 U.S. at 59-60 (Maryland statute requiring license for motion picture displays was an impermissible prior restraint because it, *inter alia*, placed on exhibitor the burden of persuasion that the film was protected expression). *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 124-25 (D.C. Cir. 1977) (FCC regulation establishing rebuttable presumption that certain speech was unprotected was impermissible prior restraint).

### D. Act 64's Presumption of Coordination Violates Due Process.

#### 1. Act 64's Presumption of Coordination Violates Due Process By Shifting the Burden of Persuasion.

Even if establishing the presumption did not so plainly offend the First Amendment, and even if there were a realistic mechanism of review, section 2809(d) would be infirm as a denial of Due Process. By imposing a mandatory rebuttable presumption that a political party's independent expenditures are coordinated, Act 64 shifts the burden of persuasion to a political party. *See Francis v. Franklin*, 471 U.S. 307, 317 (1985) ("A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding."); *see also County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 157 (1979)

(mandatory presumption "tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts").

Under the Due Process Clause, a state may not impose a mandatory presumption in criminal cases, even if rebuttable, because it has the impermissible effect of shifting the burden of persuasion. *See Francis*, 471 U.S. at 317 ("A mandatory rebuttable presumption is perhaps less onerous [than a conclusive presumption] from the defendant's perspective, but it is no less unconstitutional. Our cases make clear [such] shifting of the burden of persuasion . . . is impermissible under the Due Process Clause.").

This same heightened Due Process scrutiny applies to presumptions under civil statutes involving "affirmative Government action which seriously curtails important liberties cognizable under the Constitution." *Weinberger v. Salfi*, 422 U.S. 749, 785 (1975). Just as the government has the burden of persuasion in criminal cases, the First Amendment places on the government the burden of persuasion to show that speech is unprotected. *See Freedman*, 380 U.S. at 58. More specifically, in the context of independent expenditures, the government has the burden of persuasion that such expenditures are coordinated and thus subject to contribution limits. *See Colorado I*, 518 U.S. at 616.

Accordingly, section 2809(d)'s mandatory rebuttable presumption violates Due Process by shifting the burden of persuasion to political parties to prove that their independent expenditures are not coordinated. *See Speiser*, 357 U.S. at 526 ("It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct

enactment. The power to create presumptions is not a means of escape from constitutional restrictions.") (citing *Bailey v. Alabama*, 219 U.S. 219, 239 (1911)).

### 2. Act 64 Fails To Provide Adequate Procedural Safeguards to Allow for the Prompt Rebutting of the Presumption.

Act 64's related expenditure provision fails to provide adequate procedural safeguards for political parties. Although Vermont's secretary of state asserts in administrative guidance that the presumption of coordination is rebuttable, neither the statute nor the secretary of state's administrative guidance identifies any process by which a political party might rebut this presumption and obtain approval for the independent expenditure. The absence of a clear process for timely rebutting the presumption is an independent First Amendment violation. *See Freedman*, 380 U.S. at 60 (Maryland statute barring exhibition of motion pictures until exhibitor proved the speech was protected was invalid under the First Amendment because, *inter alia*, the statute provided "no assurance of prompt judicial determination").

The very uncertainty of any available procedure for securing prompt judicial or administrative review of the presumption will chill protected speech. As this Court has explained, "[a] scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech." *FW/PBS, Inc., dba Paris Adult Bookstore II v. City of Dallas*, 493 U.S. 215, 227 (1990). "Until a judicial decree to the contrary," *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988), Act 64's presumption stands. "In the interim, opportunities for speech are irretrievably lost." *Id.*

In the context of *political* speech in the heat of an election, delays caused by procedural deficiencies are constitutionally intolerable. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) ("[T]iming is of the essence in politics . . . and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all."); *see also Carroll v. Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968) (a delay "of even a day or two" may be intolerable when applied to 'political' speech in which the element of timeliness may be important").

## II. VERMONT'S EXPENDITURE LIMITATIONS VIOLATE THE FIRST AMENDMENT.

At least since *Buckley*, it has been clear that campaign expenditure limits violate the First Amendment because they "impose direct and substantial restraints on the quantity of political speech." 424 U.S. at 39. The reasons for this holding are as obvious today as they were 30 years ago: First, money enables speech, and more money enables more speech. Second, under a regime of contribution limits, greater expenditures necessarily imply a larger and broader base of financial support, reducing rather than increasing the reality or the appearance of *quid pro quo* corruption. Third, expenditure limits necessarily fall disproportionately on non-incumbents, who lack the profile and name recognition of incumbents.

This Court has repeatedly reaffirmed *Buckley's* holding that expenditure limits restrict core political speech and thus offend the First Amendment in the most fundamental way. *See, e.g., McConnell*, 540 U.S. at 120 (*Buckley* "treated the limitations on candidate and individual expenditures as direct restraints on speech"); *Federal Election Comm'n v. Colo. Republican Federal Campaign Comm.*, 533 U.S. 431, 437

(2001) ("*Colorado II*") ("Later cases have respected this line between contributing and spending."); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000) ("[A]n expenditure limit 'precludes most associations from effectively amplifying the voice of their adherents.'") (citing *Buckley*, 424 U.S. at 22); *Colorado I*, 518 U.S. at 610, 614-15; *Federal Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986); *NCPAC*, 470 U.S. at 491. The legislative history of Act 64 makes plain that it was intended to be, and is in fact, a direct assault on this settled and sensible precedent. *See* Memorandum from Vt. Sec'y of State Deborah L. Markowitz to the S. Gov't Operations Comm. and H. Local Gov't Comm. (Jan. 9, 2001), *available at* http://vermont-elections.org/elections1/2001gamemocf.html.[7]

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[7] This Court's decisions applying the doctrine of *stare decisis* argue strongly against overturning the holding in *Buckley*, 424 U.S. at 143. First, *Buckley's* holding that expenditures are constitutionally protected established an important liberty interest, and political parties, candidates, and other participants in the political system have acted with reliance on that holding for the last 30 years. *Cf. Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("[W]hen a Court is asked to overrule a precedent *recognizing* a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course.") (emphasis added). Second, *Buckley's* holding that expenditures are constitutionally protected has been repeatedly reaffirmed by this Court, and has caused no uncertainty or instability in the law. *Cf. id.* (consideration weighing in favor of overturning prior decision is if the prior decision "itself causes uncertainty, [because] the precedents before and after its issuance contradict its central holding"). Third, as explained in text, *Buckley's* rationale with respect to the constitutional protection afforded expenditures was entirely correct. *Cf. id.* (consideration weighing in favor of overturning prior decision was that its rationale did not "withstand careful analysis").

### A. Expenditure Limits Are Subject to Strict Scrutiny Because They Severely Burden Core Political Speech.

Political speech lies at "at the core of our electoral process and of the First Amendment freedoms." *Buckley*, 424 U.S. at 39. "[B]ecause virtually every means of communicating ideas in today's mass society requires the expenditure of money," expenditure limitations constitute "substantial rather than mere theoretical restraints on the quantity and diversity of speech." *Id.* at 19. Applying "exacting" constitutional scrutiny, *id.* at 44-45, the *Buckley* Court struck down all the expenditure limits that were before it: campaign expenditure limits, *id.* at 55-56; limits on independent expenditures by individuals and groups, *id.* at 45-48; and limits on expenditures by a candidate of his own money, *id.* at 53. In subsequent decisions, the Court struck down limits on independent expenditures by political action committees ("PACs"), *NCPAC*, 470 U.S. at 500-01, and on independent expenditures by political parties, *Colorado I*, 518 U.S. at 617-18 (principal opinion by Breyer, J.). Since *Buckley*, neither this Court, nor any circuit court until the one below, has upheld a ceiling on political expenditures. In view of this consistent precedent, it is striking that the lower court failed to explain why departure from it is warranted.

These decisions have applied strict scrutiny, requiring a showing of "a sufficiently strong governmental interest" served by the restriction and a showing that the restriction is "narrowly tailored to the evil that may legitimately be regulated." *NCPAC*, 470 U.S. at 496. *See also Mass. Citizens for Life*, 429 U.S. at 256 ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest."); *McConnell*, 540 U.S. at 135-36 (distinguishing contribution limits from expenditure limits because the latter "'preclud[e] most

associations from effectively amplifying the voice of their adherents'") (internal citations omitted); *Shrink*, 529 U.S. at 386-88 (emphasizing that restrictions on expenditures are "direct restraints on speech," subject to more rigorous scrutiny than contribution limits). The expenditure limits at issue here cannot survive strict scrutiny.

### B. Act 64's Expenditure Limits on Candidates Are Not Supported by Valid Governmental Interests.

In the thirty years since this Court decided *Buckley*, the Court has identified *only one* compelling interest that can justify campaign finance restrictions: the prevention of actual and apparent corruption in the electoral process. *See NCPAC*, 470 U.S. at 496-97 ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."). *See also McConnell*, 540 U.S. at 142 ("Congress enacted § 323 as an integrated whole to vindicate the Government's important interest in preventing corruption and the appearance of corruption.").

*Buckley* explicitly rejected various justifications offered in defense of spending limits. For example, it held that leveling the playing field to provide equivalent opportunities to candidates "is wholly foreign to the First Amendment." 424 U.S. at 48-49. It considered and rejected concerns about rising campaign costs because "[t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Id.* at 57.[8] So sound are these repudiations that the

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[8] *Compare Buckley*, 424 U.S. at 57 ("Appellees and the Court of Appeals stressed statistics indicating that spending for federal election (continued...)

lower court did not rely on these justifications in upholding the spending limits here.

Rather, the lower court upheld the restraints based upon a purported desire to prevent corruption and a desire to save incumbent legislators time from fundraising. Neither justification withstands analysis.

### 1. A Legislative Desire to Prevent Actual or Apparent Corruption Cannot Excuse *Expenditure* Limits.

In 1997, the Vermont legislature enacted Act 64 specifically to challenge this Court's holding in *Buckley* rejecting expenditure limitations. *See* Markowitz Memorandum (Jan. 9, 2001); *see also Landell*, 382 F.3d at 185 (Winter, J., dissenting). Because neither Vermont nor the lower court have identified anything in the American political process – much less in the First Amendment – that has materially changed in the last 30 years, the RNC respectfully urges this Court to reaffirm that the First Amendment proscribes expenditure limits.[9]

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campaigns increased almost 300% between 1952 and 1972 in comparison with a 57.6% rise in the consumer price index during the same period."), *with Landell*, 382 F.3d at 101 (citing findings by the Vermont General Assembly that: (1) election campaigns for statewide and state legislative offices are becoming too expensive; and (2) citizen interest, participation, and confidence in the electoral process is lessened by excessively long and expensive campaigns).

[9] Passage of Act 64 in Vermont appears less the result of any overriding public concern with corruption than a desire by a majority of Vermont's legislature to challenge the settled precedent barring spending limits.

This Court has repeatedly rejected the anti-corruption interest as a valid justification for expenditure limitations. In *Buckley*, this Court held this interest was *not* sufficient to justify the Act's limits on independent expenditures, 424 U.S. at 45-48, expenditures derived from a candidate's personal funds, *id.* at 53, and overall candidate expenditures. *Id.* at 55-56. Since *Buckley*, the Court has similarly held that the anti-corruption interest does not justify limits on independent political expenditures by political parties, *Colorado I*, 518 U.S. at 617-618 (principal opinion by Breyer, J.), and political action committees ("PACs"), *NCPAC*, 470 U.S. at 500-01.

The reason is simple. Limits on political expenditures directly limit political speech. Yet, under a regime of contribution limits, *more* money raised *lessens* the influence of each contributor. Further, once money is raised in compliance with contribution limits, the act of spending the money – on handbills, candidate appearances, or media advertising – has no actual or apparent corrupting potential.

This Court has defined corruption as "a subversion of the political process." *NCPAC*, 470 U.S. at 497. "Elected officials are influenced to act contrary to their obligations of office *by the prospect of financial gain* to themselves or infusions of money into their campaigns." *Id.* (emphasis added). Actual or apparent corruption (including undue contributor influence) in the realm of campaign finance exists primarily, if not exclusively, in transactions involving contributions, whether directly to a candidate, *see Buckley*, 424 U.S. at 25-29, or to a party committee at the behest of, or with the knowledge of, a candidate of that party. *McConnell*, 540 U.S. at 145-54. Thus, in this Court's decisions a political contribution to a candidate or a political party may give rise to the appearance of an unlawful exchange or undue influence, but a payment by a candidate

to a vendor, for example, will not. No *quid pro quo*, appearance of a *quid pro quo*, or appearance of undue influence occurs when a candidate merely spends money that has been legally raised.

It is noteworthy that there is no record in this case supporting the theory that expenditure limits are necessary to curtail corruption or the appearance of corruption in Vermont elections. Despite findings of voter apathy and frustration about costly campaigns – concerns not bearing directly upon the issue of corruptive influences in politics – proponents of Vermont's expenditure limits have been unable to identify ways in which unlimited campaign expenditures give rise to the appearance of corruption.[10] Rather, they have hypothesized about corruption caused by large campaign *contributions*.

In this case, even the lower court has acknowledged that, based upon the *Buckley* opinion, the anti-corruption interest, standing alone, is insufficient to justify the limitations on candidate campaign expenditures that were enacted by the Vermont legislature. *See Landell*, 382 F.3d at 119. This Court should reaffirm *Buckley*'s holding that expenditure limits do not deter corruption or the appearance of corruption. That holding was correct then, and it is still correct today.

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[10] *See generally Landell*, 118 F. Supp. 2d at 465-474; *see also Landell*, 382 F.3d at 189-91 (Winter, J., dissenting) ("The only particularized evidence of improper influence relied upon by my colleagues consists of one anecdote. It involved 'widely reported' meetings of major dairy companies with unnamed officials when such meetings were denied to smaller dairy organizations, Maj. Op. at 50. We are asked to assume in this case that unspecified *contributions* – in contrast to, perhaps, numbers of voters involved – were the decisive factor.") (emphasis added).

### 2. Incumbent "Time-Protection" Is Not a Valid Governmental Interest.

The Vermont legislature asserts a compelling government interest in "assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties." *Landell*, 382 F.3d at 115. The lower court recognized that this interest, alone, would be insufficient to support curbs on political expression, *see id.* at 125; it nevertheless ruled that the so-called "time protection interest" coupled with the anti-corruption interest, are sufficiently compelling reasons to excuse candidate expenditure limits. *See id.*

The premise of the time-protection interest is that an incumbent politician will be set free from the shackles of fundraising responsibilities if cost controls are implemented on the campaigns of the incumbent and his challengers.[11] By liberating the incumbent from the time-consuming burden of raising unlimited sums to funding for a successful re-election, the incumbent will be able to devote his bonus hours to "important government business" that may include "studying legislative proposals or meeting with constituents who may not be likely donors." *Id.* at 123.

The flaws in this reasoning are too numerous to compile, but a few deserve mention.

*First*, the legislature and the lower court incorrectly assumed that this asserted interest would arrive at this Court

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[11] The time-protection interest asserts that saving *incumbents* time for additional *legislative* responsibilities is a compelling government interest. Even if this dubious proposition were true, no argument has been made that there is a compelling government interest in creating more time in a challenger's schedule.

fresh and novel. To the contrary, the interest was asserted in *Buckley*, but merited barely a mention by this Court. As Judge Winter, who argued *Buckley* before this Court, recounted in his dissent in *Landell*, 382 F.3d at 188-89:

> The time-protection argument was relied upon by the Court of Appeals in *Buckley* in upholding [FECA], was the subject of an entire subsection of the brief filed in the Supreme Court on behalf of the Attorney General and Solicitor General, was argued as a justification in the brief filed in the Supreme Court by intervening parties defending expenditure limits, and was mentioned by the Supreme Court itself.

Although the Court expressly and soundly rejected equalizing candidate resources and containing political campaign costs as justifications for expenditure limits, 424 U.S. at 26, 54-59, its implicit relegation of the time-protection interest to less discussion than these rejected justifications speaks volumes. In fact, the Second Circuit is the first court to credit such an explanation for spending limits. *See generally Landell v. Sorrell*, 406 F.3d 159, 172 (2d Cir. 2005) (Walker, Jr., J., dissenting on denial of rehearing *en banc*) ("[I]n the nearly thirty years since *Buckley*, no court of appeals has found that saving a candidate's time from fundraising is a sufficient interest to justify stifling political speech.").

*Second*, this purported justification erroneously assumes that total campaign expenditures of *money* are closely correlated with total expenditures of candidate fundraising *time*. This asserted correlation falters for many reasons. To begin with, campaigning and fundraising are not distinct; candidate appearances and speeches (which Act 64 allows to continue) often have a fundraising component. Moreover,

many candidates fund their own campaigns in whole or in part with personal funds, reducing or eliminating time spent fundraising. In addition, professional political fundraisers, many of whom charge a percentage of the amounts raised, as well fundraising volunteers, carry the load for many if not most candidates, reducing the time spent by candidates on fundraising. National, state, and local political parties also provide fundraising assistance, as well as direct funding, for candidates in competitive races.

Just as important, campaigns raise money by way of direct mail and Internet solicitations, requiring little if any candidate time. As one example, during the 2004 Democratic Presidential Primary, Vermont Governor Howard Dean – one of the proponents of Act 64, who is quoted at the outset of the lower court's opinion[12] – shattered fundraising records by raising almost $15 million, more than any other Democratic candidate in history in a single fundraising quarter. *See* Alexis Rice, Fellow at the Center for the Study of American Government at Johns Hopkins University, *Campaigns Online: The Profound Impact of the Internet, Blogs, and E-Technologies in Presidential Political Campaigning* 45 (2004), *available at* http://www.campaignsonline.org/. *Half* of Governor Dean's contributions were secured through the Internet, *see id.*, requiring *no* investment of his personal time. In the subsequent fundraising quarter, 84,713 supporters made 110,786 contributions to Governor Dean's campaign. *See id.* The average amount per contribution was less than $62. *See id.*

Later in 2004, Senator John Kerry also used the Internet to raise nearly $12.5 million in one month and $3 million *in*

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[12] *See Landell*, 382 F.3d at 96.

*only one day* for his Presidential Campaign. *See* Glen Justice, *Kerry Sets Web Record in Donations*, N.Y. TIMES, July 2, 2004, at A14. As former Federal Election Commission Chairman Trevor Potter has explained, "The small donor, Internet component . . . demonstrates the importance of Internet fundraising." Lisa Getter, *The Race to the White House: Kerry up to $180 Million*, L.A. TIMES, July 2, 2004, at A27.

The well-publicized success of federal candidate fundraising on the Internet has led state and local candidates to incorporate Internet fundraising as part of their campaign strategies. *See e.g.*, Tracie Dungan, *Hopefuls Putting Hands Out on Web: Campaigns Tap Online Potential*, ARK. DEMOCRAT-GAZETTE, Nov. 13, 2005. Indeed, many *Vermont* political parties[13] and politicians, including incumbent candidates for Lieutenant Governor,[14] State Senate,[15] State Representative,[16] and Mayor,[17] have used the Internet to raise campaign funding without consuming candidate time. In short, there is no sound basis either in this record or elsewhere to show convincingly that responsible public officials are shirking their official duties to raise campaign cash.[18]

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[13] *See* http://www.vtgop.org; http://www.vtdemocrats.org; http://www.vtlp.org; http://www.progressiveparty.org; and http://www.windhamdem.org.

[14] *See* http://www.briandubie.com.

[15] *See* http://www.mattdunne.com.

[16] *See* http://www.timjerman.com and http://sueminter.com.

[17] *See* http://www.hindaformayor.com.

[18] Candidates vary immensely in their ability to raise money. One candidate might devote countless hours to fundraising without accumulating funds that reach the expenditure limit; another might reach or exceed the same limits in substantially less time. Put another way, Act

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*Third*, as the Sixth Circuit has observed, the "time-protection" justification is inextricably linked with – and in reality is a euphemism for – the cost containment justification repudiated in *Buckley*. *See Kruse v. City of Cincinnati*, 142 F.3d 907, 916-17 (6th Cir. 1998) ("The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns. However, because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.").

*Fourth*, the sole purpose of the time-protection interest is to assist incumbent legislators in enhancing their job performances by decreasing the number of hours necessary to raise money to compete with their challengers.[19] By enacting dollar limits to assist legislator-candidates with their official job responsibilities, however, the legislature unfairly burdens challengers and further insulates incumbents from competitive elections.

Taking the preferred justification at face value, we are told that incumbent legislators who spend less time fundraising because of expenditure limits are able to schedule more time for official responsibilities such as studying legislative proposals, attending legislative hearings, and

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64 incorrectly assumes that fundraising places equal demands on the time of all candidates.

[19] *See generally Landell*, 406 F.3d at 172 (Walker, Jr., J., dissenting on denial of rehearing *en banc*) ("Where an officeholder complains that taking time to fundraise makes it harder to do the job and that the government has an interest in preventing this, the officeholder is saying in effect, 'The government has an interest both in my doing my job and in getting me reelected by making campaigning (fundraising) easier.' It has an interest in the former, but certainly not the latter.").

meeting with constituents. But all of these activities lead to increased political exposure for incumbents. Empowered with the bonus hours made possible by the expenditure caps, they are more capable of attending "meet and greets," speaking at Rotary Club and Jaycee meetings, holding press conferences, meeting with newspaper editorial boards, and participating in local television and radio interviews. In sum, any additional time made available and actually used for official duties will only enhance the power of incumbency, because incumbents, unlike challengers, can more easily attract free media attention and exposure by their official activities.

Non-incumbent candidates, on the other hand, are much less likely to benefit from the asserted time-protection resulting from Act 64's expenditure limits. With expenditure limits, the ability of challengers even to divert the unused fundraising time to travel and campaign events will be limited because all those campaign activities cost money. Precisely because they are less able to attract media attention and exposure than incumbents, challengers need to spend additional money to compensate for the incumbent's natural advantages.[20] For example, incumbency provides several

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[20] Validating (but not ameliorating) this concern, Vermont arbitrarily enacted a "rare" accommodation for challengers in its campaign finance law that requires certain incumbents to spend at least 10 to 15-percent less than the statutory limits in an election cycle. In contrast, challengers may spend up to 100-percent of the expenditure limit. *See* VT. STAT. ANN. tit. 17, § 2805a(c) ; *see also Landell*, 382 F.3d at 128. Thus, an incumbent candidate for Governor may spend $45,000 less than a challenger in an election cycle; $15,000 less in races for Lieutenant Governor; $6,750 less in races for secretary of state, state treasurer, auditor of accounts or attorney general; and between $650 and $200 less in races for the general assembly and county offices. *See* VT. STAT. ANN. tit. 17, § 2805a(a), (c). Even with the more generous spending allowances for challengers, however, the statute impinges their

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advantages in an election, including name identification, increased media exposure, and use of public resources associated with the officeholder's position.[21] Expenditure limits place substantial burdens on the ability of challengers to overcome these advantages by restricting the volume of their political expression, and inhibiting them from mounting adequate challenges to incumbents.

*Finally*, there is no basis for distinguishing fundraising from other time-demands in a legislator's schedule. Although the premise of the time-protection argument is that government has an interest in legislators dedicating more time to officeholder duties, only fundraising is singled out as a burden on those responsibilities. This ignores countless other campaign activities, such as political party luncheons and candidate forums, which may subtract equal or greater amounts of time from an officeholder's schedule.[22] Also oddly, unlike many states, Vermont does not require its legislators to give up or limit time spent in outside

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First Amendment rights by substantially limiting what they may ordinarily be able to spend to engage in political dialogue.

[21] Examples include government websites, press releases, media advisories, and constituent or "franked" mail.

[22] *See e.g., Homans v. City of Albuquerque*, 366 F.3d 900, 912 (10th Cir. 2004) ("The claim that fund-raising prevents officeholders from engaging in alternative campaign tactics such as individual door-to-door contact is interesting. Albuquerque does not articulate any reason why there is a compelling state interest in channeling campaign resources to favor individual voter contact rather than fund-raising tactics. *There is no indication in the record that, for example, the added burden of fund-raising events and phone calls is more demanding on an officeholder's time than the burden of individual voter contact.* Nor does the record persuade us that individual voter contact is a fundamentally superior campaign strategy because fund-raising efforts compromise an officeholder's ability to communicate with the public.") (emphasis added).

employment, *see* VT. STAT. ANN. tit. 2, §§ 1-22 and JOINT RULES OF THE SENATE AND HOUSE OF REPRESENTATIVES OF VERMONT (adopted Jan. 30, 1990), *available at* http://www.leg.state.vt.us/misc/rules2.htm, casting further doubt on the legitimacy of the "time-protection interest." At bottom, the only policy interest advanced is a circular one: it frees lawmakers from *fundraising activities*.

In sum, the time-protection interest serves only the interest of incumbent officeholders. Vermont has no compelling interest, however, in protecting the schedules of incumbent lawmakers from fundraising activities. Because time-protection is not a valid interest supporting Vermont's expenditure limits, this Court should reverse the lower court.

### C. Act 64's Expenditure Limits Are Not Narrowly Tailored To Advance the Asserted Interests of Anti-Corruption and Time-Protection.

In addition to being justified by a compelling government interest, expenditure limits must be "sufficiently narrowly tailored to achieve" that interest. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990). Furthermore, a government must employ the least restrictive means possible to advance that interest. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665-66 (2004). In this case, even if the Court were to determine that anti-corruption and time-protection are compelling government interests justifying expenditure limitations – and they are not – Act 64 would fail for lack of narrow tailoring.

#### 1. Act 64's Expenditure Limits Do Not Advance the Asserted Interests of Anti-Corruption and Time-Protection.

Expenditure limits are not effective in reducing the *appearance* of corruption in the electoral process. To the

contrary, Act 64 perversely *promotes* corruption because its limitation on expenditures (and hence the number of contributions that might be accepted) *increases* the significance of each individual contribution. Under a regime of contribution limits with no spending cap, the likelihood of corruption diminishes as the number of contributors increases.

Also perversely, Act 64 does not limit the total amount a candidate can *raise*; it limits only what he can *spend*. At any time of heightened interest in the legislative agenda – when the hypothetical potential for *quid pro quo* corruption is at its zenith – a legislator may decide to amass a large war chest for use in future electoral cycles or to pursue other political ambitions. Thus, the expenditure limitations may not even limit time spent fundraising during the busiest legislative periods.

Even if effective at reducing time spent fundraising, Act 64 does not ensure that incumbents will devote additional time to their official duties. For example, Elizabeth Ready, a Vermont legislator and Respondent-Intervenor in this case, testified at trial that expenditure limits would help eliminate the burdens of fundraising and enable her to campaign door-to-door, visit county fairs, and attend local events. *See Landell*, 382 F.3d at 123. Although these activities may increase person-to-person contact with some constituents, they are more accurately described as campaign activities rather than official duties.

Furthermore, expenditure limits hinder a candidate's ability to campaign efficiently using paid-communication methods such as direct mail, television, radio, and newspaper advertisements. To the extent that expenditure limits force incumbents to rely more on time-intensive personal campaigning rather than media advertising that will reach

more voters, the limits defeat the ostensible purpose of time-protection for incumbents.

### 2. Act 64's Expenditure Limits Are Not the Least Restrictive Means of Advancing the State's Asserted Anti-Corruption and Time-Protection Interests.

Even if anti-corruption and time-protection are compelling interests that might sustain Act 64's expenditure limits, and even if Act 64 advances those interests to some degree, Act 64 does not do so in the least restrictive manner.

*First*, Vermont's expenditure restrictions will demonstrably *reduce speech* because the statute's spending caps are based on expenditure *averages* from previous elections, including those that were nominally contested. *See Landell*, 382 F.3d at 173-74. By definition, many prior campaigns – usually the most competitive ones where incumbents were most at risk – cost more than the legislatively-mandated averages. Consequently, expenditures, and thus speech, in the most competitive races will actually *diminish* as a result of the arbitrary calculations. *See Buckley*, 424 U.S. at 20 (invalidating expenditure limits that "would have required restrictions in the scope of a number of past congressional and Presidential campaigns").

*Second*, the expenditure limit unnecessarily prohibits candidates from using their own resources. As *Buckley* forcefully ruled, "the First Amendment simply cannot tolerate [FECA's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." 424 U.S. at 54. Just as a self-financing candidate cannot corrupt himself, his use of personal resources also does not require expenditure of time raising money from others.

*Third*, the legislation unnecessarily and unfairly regulates spending in *all* races by *all* candidates. To protect the time of officeholders so they may legislate and perform their official functions, it is unnecessary to limit expenditures in *open seat* contests between *non-incumbents*. Nor is it necessary to limit spending by non-incumbents running against incumbents. As noted above, incumbents have various "in kind" political advantages by virtue of holding their offices, so they would not be unduly disadvantaged by expenditure limits that applied solely to incumbents.

*Fourth*, other states such as Georgia, *see* GA. CODE § 21-5-35(a), have used a less restrictive time limitation on fundraising, prohibiting candidates from raising money while the legislature is in session.[23] This approach would complement Vermont's current statutory framework, *see* VT. STAT. ANN. tit. 2, § 266(3), which prohibits lawmakers from accepting contributions from *lobbyists* during legislative work periods.[24]

*Finally*, Act 64 is overbroad by limiting expenditures, regardless of the source of the funds. As shown (pp. 20-21 above), expenditures derived from telemarketing, direct mail, the Internet, and other non-personal forms of solicitation do not require a substantial investment of personal time from the

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[23] *See also* ALA. CODE § 17-22A-7(b)(2); IND. CODE § 3-9-2-12; IOWA CODE § 68A.504(1); LA. REV. STAT. ANN. § 18:1505.2(Q)(1), (R)(1); MD. CODE ANN., ELEC. § 13-235; NEV. REV. STAT. 294A.300, 310; N.M. STAT. ANN. § 1-19-34.1; OKLA. STAT. tit. 74, § 257:10-1-6; TENN. CODE ANN. § 2-10-310(a)(1), (b); and TEX. ELEC. CODE. ANN. § 253.034.

[24] Other states precluding lobbyist contributions during legislative sessions include Arizona, ARIZ. REV. STAT. § 41-1234.01, and North Carolina, N.C. GEN. STAT. § 163-278.13B. Moreover, states like Kansas, KAN. STAT. ANN. § 25-4153a, permit legislators to accept contributions only from *individuals* during legislative sessions.

candidate. Thus, to the extent that time-protection is a valid interest, and to the extent that Act 64 advances that interest with regard to personal solicitations, Act 64 is still overbroad because it restricts expenditures derived from non-personal solicitation sources.

## CONCLUSION

For the reasons set forth above, *amicus* RNC urges the Court to reverse the decision of the Second Circuit.

Respectfully submitted,

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